UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CUNG LE, et al.,	)	
	)	
Plaintiffs,	)	Case No. 2:15-cv-01045-RFB-PAL
	)	
vs.	)	Las Vegas, Nevada
	)	Friday, December 14, 2018
ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC,	)	2:12 p.m.
	)	
	)	MOTIONS HEARING
	)	
Defendants.		

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See Next Page

COURT REPORTER: Patricia L. Ganci, RMR, CRR
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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LAS VEGAS, NEVADA; FRIDAY, DECEMBER 14, 2018; 2:12 P.M.

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P R O C E E D I N G S

THE COURT: Please be seated.

COURTROOM ADMINISTRATOR: Now calling Le, et al., versus Zuffa, LLC, Case Number 2:15-cv-01045-RFB-PAL. This is the time for the hearing regarding Docket 518, motion to certify class, and Docket 573, motion for summary judgment.

Starting with counsel for plaintiffs, please note your appearance for the record.

MR. CRAMER: Your Honor, Eric Cramer from Berger Montague for the plaintiffs. And I'd like to take the opportunity, Your Honor, if you don't mind, to introduce you to my clients; four of whom are here today. We have Nate Quarry, Jon Fitch, Kung Le, and Kyle Kingsbury.

THE COURT: Good afternoon.

MR. CRAMER: Thank you.

THE COURT: And who else is with us at counsel table?

MR. DAVIS: Good afternoon, Your Honor. Josh Davis from the University of San Francisco School of Law, and I'm here on behalf of the Saveri Law Firm representing plaintiffs.

MS. CHEN: Good afternoon, Your Honor. Jiamie Chen also from the Saveri Law Firm on behalf of the plaintiffs.

MR. DELL'ANGELO: Good afternoon, Your Honor. Michael Dell'Angelo from Berger Montague on behalf of the plaintiffs.

MR. KOFFMAN: Good afternoon, Your Honor. Richard Koffman from Cohen Milstein on behalf of plaintiffs.

MR. SILVERMAN: Daniel Silverman, Cohen Milstein, on behalf of plaintiffs.

MR. MADDEN: Good afternoon, Your Honor. Patrick Madden from Berger Montague on behalf of the plaintiffs.

MR. SPRINGMEYER: Good afternoon, Your Honor. Don Springmeyer, Wolf Rifkin, for the plaintiffs.

THE COURT: Good afternoon.

For the defendants in this case?

MR. ISAACSON: Bill Isaacson, Your Honor, from Boies Schiller and Flexner for the defendant.

MS. GRIGSBY: Good afternoon, Your Honor. Stacey Grigsby from Boies Schiller and Flexner for the defendant.

MR. MCKNIGHT: Good afternoon, Your Honor. Riche McKnight from Endeavor for the defendant.

MR. WIDNELL: Nicholas Widnell of Boies Schiller Flexner for the defendant.

MR. CAMPBELL: Hunter Campbell, Chief Legal Officer of Zuffa.

MR. WILLIAMS: Good afternoon, Your Honor. Colby Williams of Campbell and Williams on behalf Zuffa, LLC.

THE COURT: Good afternoon.

Now, that we've gotten through all of that, I first want to address, there was a fairly recently-filed motion to

seal by the defendants. And who's going to be addressing that?

MS. GRIGSBY: I am, Your Honor.

THE COURT: So I will at least first say that I would expect that the motion would have been filed much sooner than it was filed. And so I'm a little concerned about the timing of it as it relates to when it was filed. That being said, why don't you come up to the podium and let's talk about the motion itself.

And Ms. -- is it -- I'm sorry. Is it Grigsby?

MS. GRIGSBY: Yes, Your Honor.

THE COURT: You can raise that. There's a little button there to help. No, on the actual podium. There you go. So you don't have to bend over. There you go.

So, Ms. Grigsby, here's my concern. At some point some of this material has to become public. I don't know that it gets to be protected. So I'm trying to understand why I would grant the motion to seal in the context of the proceedings.

Now, what I will tell you all now so you are aware of this. The Court intends to order an evidentiary hearing in which all of the experts would be required to testify at a time which I -- we have set. And we'll see if it works with you. And I have a list of the experts that I want to appear to testify.

So, Ms. Grigsby, now that you have that new information, why would I seal this proceeding in the context of

what the law tells me about the proceedings generally being public? Some of the arguments you make actually suggest that there's actually no formula to protect, right, their individual determinations about how people are paid. So I'm not sure what the proprietary interest would necessarily be. And at some point in terms of review of this Court's decision, which I fully expect will happen in this case, it makes sense for the record to be public.

Now, that's not to say that I would intend to unseal what has been sealed. It would simply be that in the context of the discussion of the motions and the testimony of the experts that going forward that there would be no sealing of that information. Why would I seal any of that information?

MS. GRIGSBY: So, Your Honor, just to clarify, I think there are two separate issues. And the filing from or from last night addresses the very specific issue of what sealing or what should be discussed in the procedures for this particular hearing.

So just to start out, let's talk about what everybody agrees upon. I don't think anybody here is actually suggesting that we seal the courtroom for these proceedings. What the parties were negotiating was, if there are exhibits and information that right now have conditionally been lodged under seal, what -- what procedures we should take before we receive a ruling from the Court in order to make sure that we are

preserving the potential confidentiality.

So, for example, if plaintiffs filed an exhibit and later this Court, you know, grants the motion to seal, unless there are parameters in place, then the plaintiffs could merely read that information into the record, including the information of individuals, of athletes, Zuffa's financial information, their event-level information. So really what we're looking for is parameters.

So the --

THE COURT: So let me tell you what I think are appropriate parameters. Individual information about individual fighters would seem to me to be appropriate to be protected. Zuffa's financial information at this point doesn't seem to me warrants protection because at some point that's going to be a part of at least what I'd have to consider, not all of the financial information, but the discussions as it relates to event revenue, percentages of event revenue, comparisons between Zuffa and other promoters, the percentage of the revenues compared to other professional sports. I don't see why any of that information should be sealed.

MS. GRIGSBY: Well, just for an example, like when we're talking about the comparison to other promoters, our suggestion was to use relative terms like higher or lower for these purposes. And one of the reasons why is that third parties have produced information. And in fact Bellator,

another promoter, received assurances from the Court on June 1st, 2017, that their information would not be disclosed publicly in hearings without notice to them first. So --

THE COURT: Well, I can give them notice, right. I'm going to have the hearing, and I can tell them there's going to be a hearing in January. And if a party whose information was disclosed with that representation wants to object to protect it, I will give them an opportunity to be able to do that.

MS. GRIGSBY: Yes, Your Honor, and we fully agree, I mean. So the stage that this is coming to you is that Zuffa had no intention of using and publicly displaying information or reading into the record any materials that were lodged conditionally under seal. We consulted with plaintiffs pursuant to paragraph 13 of the protective order to see how they planned to proceed in this hearing. During that meet-and-confer process, we were informed that plaintiffs intended to display things even if they had been "Marked Highly Confidential Attorney's Eyes Only" under the protective order, and I asked them if they were going to provide notice. They said they were making a judgment call on certain pieces of information.

So that filing relates to that particular issue, the fact that we cannot reach an agreement on for the purpose of just this hearing, not in January, what types of guideposts we should have. So our suggestion and I think everybody agrees that we will hand up hard copies as opposed to using a display.

It doesn't even look like it's possible to display it into the galley.

THE COURT: Oh, it is. I'm not going to lower the screen that's big, but I'm not saying we'll do that at this because -- you know. And, of course, I wasn't trying to elicit a response, but the fact is it's possible. And I think there has to be a determination of how we go about that.

What I'm saying, Ms. Grigsby, is that at some point I don't think it's reasonable to expect that all of this information would be kept from the public record. And so it seems to me the question is at this point if there are representations about what was obtained -- if there are representations made about obtained information, we give people notice. If there's particular information you want protected for a hearing, then you all can make a request from me, but it does seem to me certainly portions of the record are going to necessarily need to be public and it's a question of what that is.

So, if we move past your current motion because as I've indicated to you what we're really going to be talking about today is what the contours of the argument, the hearing, will be that I'm going to set based upon the motions to certify and the arguments that are made in the motion for summary judgment, but the motion to certify has to come first. So if you want to go ahead and make a suggestion about that moving forward, we might

as well move into that, and then we can move back to what the parameters of the hearing will be in terms of the substance. But since you're up here, you might as well tell me what you would suggest for the hearing.

MS. GRIGSBY: Yeah, my suggestion would be to give the parties an opportunity to meet and confer and consult specifically about information that is designated right now in the motion for summary judgment or the motion for class certification on whether we can reach an agreement as to, you know, whether we're going to object to it or not. As I said, we came prepared to use information that was not lodged conditionally under seal. It was just upon learning that that was the plaintiffs' intent that we wanted to bring it to your attention.

So I think that it makes sense for the parties to go back. As you could have noticed in the briefing for the motion to seal, we withdrew 25 exhibits along with our motion for summary judgment that were conditionally lodged under seal and we unsealed them. So I think that it would be possible for us to reach an agreement on many, many things.

So I think there's that, but I also think secondarily as you said, and just picking up, that at least third parties who have produced under some kind of agreement with plaintiffs or an assurance by the Court that their information will not be disclosed publicly. All of them should receive notice and have

a chance to object so that we can resolve those issues as well.

THE COURT: Okay. I will take that into consideration. I appreciate that, Ms. Grigsby. Thank you.

MS. GRIGSBY: Thank you, Your Honor.

THE COURT: Let's move -- and I know the plaintiffs might want to respond, but I want to move to the issue of the hearing and the motion to certify. So who's going to be arguing the motion to certify for the defendants in this case?

MR. ISAACSON: Bill Isaacson for Zuffa.

THE COURT: Don't stand all the way back there, Mr. Isaacson. Why don't you come all the way up to the podium.

So, Mr. Isaacson, I had initially denied the request for an evidentiary hearing today --

MR. ISAACSON: Yes, Your Honor.

THE COURT: -- because I wanted to make sure that I had gone through all of the material and reviewed the recent case law, but also because I think that we need to understand what the parameters of any hearing would be. I do think that given the Supreme Court law as it relates to the type of analysis that's required and I think that at this point I'm convinced that the Court may have to make certain factual determinations about expert opinions because they are at different times diametrically opposed with respect to identical at times data.

That seems to me something that has to be resolved. And in going through the reports, it seems to me it would be

difficult for me to resolve that without having the experts testify and hearing their testimony, observing them, to decide whether or not it's appropriate to use wage share or a percentage of event revenue as a legitimate economic model or not and who said that and whether or not it's appropriate to make these comparisons.

And so in reviewing that and in reviewing the case law, it seems to me that I have to make those determinations to be able to resolve the motion to certify because I have to tell you it seems to me, quite honestly, it comes down to the fact whether or not I accept Dr. Singer's expert opinions or Dr. Topel or whoever's opinions. That's essentially a central aspect to not just the motion to certify, the case basically, I mean. And it's also true that some aspects to this are somewhat unique in terms of the modeling, but it's also true that this is the first time that I can see there's a case in an industry like this and in this type of a trajectory that is something the courts have considered post Tyson and Comcast which I think changed the landscape for how courts look at these types of things.

All that is to say that it seems to me that the procedure that I think would be appropriate would be to have the experts and only the experts with the exception of one individual, which would be Mr. Silva, because I also think Mr. Silva's testimony is potentially crucial at least to be able

to evaluate whether or not there was in fact internal pay equity. And if there was, that's I believe potentially a separate basis.

So let me hear, Mr. Isaacson, your comment as it relates to that proceeding and what you think should be the contours or not of that in the context of this case. By my estimation that could take three or four days unfortunately in part because of the complex nature of some of the modeling and because you have different models for different aspects of the common impact, right.

MR. ISAACSON: Yes.

THE COURT: So it's not as if it's one model that covers all of these things, right. You have different models. You have different markets. You have different sort of null markets, if you will, that apply in the context of the comparisons between the fighters and ranked fighters. And so why don't you tell me what your thoughts are as it relates to that procedure in this case.

MR. ISAACSON: Well, essentially we agree with you, Your Honor, that for purposes of determining class certification and the central issue which underlies the plaintiffs' case as to how they're going to prove antitrust injury common throughout the class that this relies on the work of Dr. Snyder and the theory of both wage share and foreclosure share. Foreclosure -- right now the regression is a relationship between foreclosure

share which is --

THE COURT: I'm sorry. Did you say Snyder?

MR. ISAACSON: Yes, I did, but my mistake.

THE COURT: It's Singer, right?

MR. ISAACSON: Yes, Singer. Yes, I was dealing --

THE COURT: I was like, Okay --

MR. ISAACSON: I was dealing with Dr. Snyder last week.

THE COURT: No, that's okay.

MR. ISAACSON: Right, right, right.

THE COURT: I've spent a fair amount of time with this record. And so I was like how could I have missed this name?

MR. ISAACSON: I've begun by misspeaking.

THE COURT: Okay.

MR. ISAACSON: So -- but the regression which relates to a foreclosure share, which while it has the name foreclosure is not an actual estimate of market share or a fact at commerce, it's a count of the number of 30-month contracts. So that's one end of the formula. And the other end of the formula is to create a relationship to wage share.

And both of those we feel are -- lack a foundation to create common impact, which gets to this issue of post Comcast, particularly the need to show that all or virtually all class members were injured, which is under Rule 23 an issue only for the Court. It's not something that goes to the jury. You don't have a verdict form about is there -- was there common impact.

It's part of the predominance inquiry under Rule 23.

So, I mean, I think Judge Koppe when she was talking about these standards talked about you have to go look at these experts and decide who's the most persuasive, which is in essence what happens at any trial. And that's what we're talking about. And so we agree with that.

We're perfectly happy to have pay equity be part of this, and if you want to hear from Mr. Silva on equity, that is --

THE COURT: The reason why I say that, Mr. Isaacson, is because it does seem to me that's a potentially separate basis. I'm not saying it's established, but let's say if he were to stand up and say, "Oh, you got me. We had this internal formula we used for each fighter's compensation." I'm not saying he says that.

MR. ISAACSON: Right.

THE COURT: But if something like that were to occur, I think you would agree that that could be very significant in the context of the motion to certify, including all of the evidence.

MR. ISAACSON: So I would not -- would not agree with that and I don't think -- and Dr. Singer would not agree with that because -- and let me explain. He -- they advance this as relevant and probative and helpful, right, but that -- that pay equity analysis, which is a separate regression that Dr. Singer runs, does not reach a conclusion about any injury or impact.

It merely shows that -- it concludes that when -- basically a rising -- a rising tide raises all boats, but it doesn't show any actual common impact or amount of impact.

So while I would agree with -- agree with you that it's --

THE COURT: So you're saying it wouldn't be relevant to deciding whether or not there's certain factors like ranking that were uniformly considered or, you know, weight? I mean, it seems to me that at a minimum what a Zuffa witness, whoever it would be, would be able to say, "This is a factor we considered every single time."

Now, you could still make the argument that there are individual determinations that go into a single factor. I'm not saying you couldn't make that argument. But it seems to me that it's hard to not consider relevant a Zuffa employee's, who's been involved with compensation, testimony about whether or not a factor was uniformly considered. It doesn't mean that it establishes --

MR. ISAACSON: Right.

THE COURT: -- common impact. But it does mean that there is an issue to be addressed as relates to separating out the impact of the alleged antitrust injury versus common factors.

MR. ISAACSON: So I am not advancing the argument that it's irrelevant.

THE COURT: Okay.

MR. ISAACSON: And so if you want -- I was merely pointing out I think what you've understood. It doesn't get you there.

THE COURT: No, I don't think it gets you there either, but I'm just saying -- I'm just saying in the context of the expert analysis it seems to me that that -- that information is the information from one -- the only that I can see lay witness potentially in terms of a party representative which would impact my assessment of the experts' opinions. That's what I'm saying.

MR. ISAACSON: Right.

THE COURT: I'm not saying that I would look at whoever the different employee is and say, "Ah, based upon my credibility determination for you I find that the class is certified." I'm not going to say that. But I do think that it is given what the parties have submitted a relevant part of the Court's overall assessment of these models.

MR. ISAACSON: I'm not advancing or this is not a motion in limine on this issue. It's not a relevance argument.

THE COURT: Okay.

MR. ISAACSON: I'm simply saying if foreclosure share doesn't survive or wage share doesn't survive, the pay equity argument becomes -- it doesn't get you there.

Now, I will -- I'll have to say Mr. Silva has one thing

in common with the experts. He is a third party. He is an ex-employee. So we will have to ask him to do this and talk to him about his schedule.

THE COURT: Well, we could issue a subpoena, right. I could authorize that.

MR. ISAACSON: Right. He is --

THE COURT: That could potentially address that.

MR. ISAACSON: He doesn't live around here, but -- but I think -- I think we will be able to talk to him cooperatively, but I have the obligation to say he's not a current employee.

THE COURT: No, that he's not in your control. That's fine. And we can consider that in the context of the hearing schedule because obviously this is not a jury trial. This is the Court's time.

MR. ISAACSON: Right.

THE COURT: And so we can work around that with scheduling.

MR. ISAACSON: Right.

THE COURT: So what I had envisioned then would be again the -- let me go through, and I'll get your feedback on this, the witnesses that I have on my list. Give me a second here.

Is there anyone else other than the experts, Mr. Isaacson, you think that the Court should hear from in relation to this? Because, as I said, I do think given what's

been advanced and given the nature of the expert modeling, but also as I said thinking about Comcast and what I'm required and can resolve, it seems really it's a standard related to the Court deciding issues regarding expert opinions and what can and cannot be sort of relied upon and accepted and me granting the motion to certify or denying the motion to certify.

MR. ISAACSON: Yes. Yeah, we -- when we asked for a hearing, we thought we'd proposed a hearing of experts. So in the absence -- in the absence of hearing something from the plaintiffs about this that we need to respond to, I agree with you.

THE COURT: So here are the witnesses that I think would need to be called or appear: Dr. Hal Singer, Dr. Zimbalist, Professor Allan Manning, Joseph Silva, Roger Blair, Robert Topel, and Paul I think -- is it Oyer? Over?

MR. ISAACSON: Oyer, yes. I will say to you that the Blair/Zimbalist pairing has not been advanced to show common injury. I'm not going to suggest that they don't have some potentially relevant things to say, but they have not been advanced to try and support class certification on the issue of common impact or injury.

THE COURT: Well, I thought they'd been just advanced to talk about what are appropriate comparisons with respect to other sports and as it relates to the idea of a percentage of the revenue and an event and whether or not that's appropriate.

Maybe I'm wrong, but that's --

MR. ISAACSON: They do --

THE COURT: I thought Dr. Zimbalist actually talked explicitly about that.

MR. ISAACSON: Yes, yes. But only -- he was very careful to limit that analysis to a damages calculation and has no opinions on the issue of common impact.

THE COURT: Well, I don't --

MR. ISAACSON: Again -- and, again, I'm not telling you that it's entirely irrelevant, so ...

THE COURT: But I want to make sure, though, what you're not going to then argue to me is, "Well, they don't have -- even if you have common impact, they don't have a way of assessing damages across the class that can actually identify and address injury." Because if that is the case, then I'm not sure how damage is not going to be a part of it. Because the way that I read Comcast, that can also potentially --

MR. ISAACSON: Yes.

THE COURT: -- find in the context of whether or not the plaintiffs can adequately come up with a formula that --

MR. ISAACSON: Right.

THE COURT: -- that can distinguish individual factors from antitrust injury. And so --

MR. ISAACSON: I agree with you.

THE COURT: -- how does that comparison not come into

play with respect to that?

MR. ISAACSON: I agree with you with respect to that issue on the damages.

THE COURT: Because I understood that to be part of your argument.

MR. ISAACSON: Yes. Right.

THE COURT: I understand part of your argument to be in addition to common injury they can determine damages appropriately in a manner that's acceptable in terms of being able to distinguish between, quote, unquote, procompetitive revenue and antitrust injury-related revenue.

MR. ISAACSON: Right. And in some sense you could segment the hearing between those groups of experts on injury and damages --

THE COURT: Okay.

MR. ISAACSON: -- as it relates to class.

THE COURT: Okay.

MR. ISAACSON: And I think that would be an appropriate way to structure it.

THE COURT: Okay. I mean, because I think in looking at the modeling they seem to be related.

MR. ISAACSON: Yes.

THE COURT: And so it does seem to me that it's not always clear that you can simply bifurcate it, but to go back to the initial point, the reason why I put Dr. Zimbalist and

Professor Blair on the list is to deal with the issue of sort of the appropriateness of some of these variables or terms because I think that's very much a part of being able to determine what the nature of the antitrust injury is or is not.

MR. ISAACSON: All right. Well, then we would very much like -- appreciate the opportunity to give you that information.

THE COURT: Okay. Because that's what you've essentially presented in your submissions.

MR. ISAACSON: Yes.

THE COURT: Okay.

Is there anything else, Mr. Isaacson, that you think we would need to work out in the context of this proceeding? Because what I would anticipate is that we would have essentially sort of like a prehearing conference to go over issues that I anticipate are going to come up in this litigation about what sort of exhibits can be used, what's the nature of the inquiry. I don't want this to be a full trial of this case. On the other hand, I fully recognize that much of the case and the argument revolves around these experts' opinions.

MR. ISAACSON: Yes.

THE COURT: And so in this case I think it's unavoidable that you're going to have in the resolution of the experts' opinions' reliability significant overlap with the merits because that's the nature of this type of an antitrust

case it seems to me.

MR. ISAACSON: I think at this point we would just be looking to -- for your guidance as to your preference as whether you want to go through the traditional format of the plaintiffs put on their experts and then there's cross-examination and we put on our experts. It's also possible that -- we've mentioned procedures where the experts are there at the same time so the Court can address them both at the same time. Sometimes that's called hot tubbing. And there's also the possibility you could go back and forth between certain experts.

THE COURT: So what I would expect is a back and forth. There's certain things in the opinions and the submissions which seem to me just to be essentially very different conclusions even about similar data or similar variables. And so I would anticipate that I would be asking them, "Why given this set of information you reached this conclusion," and then bring the other expert up. I mean, again, this would probably spend -- excuse me. Probably most of the time would be spent with Dr. Singer --

MR. ISAACSON: Yes.

THE COURT: -- and Professor Topel.

MR. ISAACSON: And very little time with Dr. Snyder.

THE COURT: So they would be the marquee experts, right. If we were going to have an event, they would be likely, right, the marquee -- the main event.

MR. ISAACSON: Right.

THE COURT: And so I think that we would probably start with them and then bring in, in exact opposite of actually a bout, bring in the sort of undercard later, right. But I think that if we start with Dr. Singer and Professor Topel and then we move on from there. Because it does seem to me that, again, if I don't accept some of the modeling from Dr. Singer, then this case is basically over.

MR. ISAACSON: Right.

THE COURT: But if I do, there are other implications. Because we haven't actually talked about and I've actually not seen this come up since Comcast what are the implications of my factual findings about expert opinion in a later proceeding. Now, we don't have to discuss that, but that's something that I think we should think about because if I make a determination, for example, and I'm not saying that I would, that this is an appropriate modeling, does that foreclose the defendants from raising that at any point later on in this case?

I don't know that there has been a case that I've seen, Mr. Isaacson, that has since Comcast gone through the level of analysis I think Comcast suggests that has to then deal with the issue of what are the implications of those findings as relates to potentially sort of law or findings for the case. Because I -- that's a separate issue, but I wanted to highlight that for you all --

MR. ISAACSON: Right.

THE COURT: -- because it's important for you all in terms of preparation for the hearing to potentially be prepared for that as an issue and for us to resolve it or not, I mean. So if either side expects that if there are findings and the case potentially proceeds that those findings could be binding as relates to certain aspects of the case, we should resolve that, I believe, ahead of time.

MR. ISAACSON: Right.

THE COURT: So that if you feel there is certain information that needs to be presented at the hearing because of the nature of how those findings would apply to the rest of the case, then you need to let me know that.

MR. ISAACSON: All right. I think that raises a couple of issues. One is the Daubert motions are sort of set aside without prejudice and are not live at this point. And it would make sense if they became live for purposes of this hearing without any additional briefing, just that the previous -- just the previous briefs, which would allow you to then decide, for example, whether they've met the Daubert standard, but not the Rule 23 standard or they didn't even make the Daubert standard because that would have an effect on the question you're raising.

And then, second, if you find that they don't meet the Rule 23 standard for common impact, then the issue just becomes

then there's no class.

THE COURT: There's no case really at that point.

MR. ISAACSON: Well, there's -- there's technically individual plaintiffs who have to decide whether to present individual damages claims.

THE COURT: Right, I mean, there's no class -- there's no class case.

MR. ISAACSON: Right, it's just about those individuals.

THE COURT: Right, right.

MR. ISAACSON: And so the question would --

THE COURT: I should clarify --

MR. ISAACSON: If they try to use those models to demonstrate those damages, then the issue that you're discussing becomes a live one.

THE COURT: Right. I understand what you're saying.

But I meant in terms of there to be no case, there's no class --

MR. ISAACSON: Correct.

THE COURT: -- action case that would proceed, but there's still obviously the individual plaintiffs if I were to decide that. But, again, we're getting a little bit ahead of ourselves.

MR. ISAACSON: Yes.

THE COURT: But I did want to again highlight the issue

of the implications of the finding if the case were to move forward because I think then the parties should at least have an eye towards that possibility. And that way if they want to be able to make a record that they think is appropriate, they can do that at the hearing.

And I agree that we have -- we have to address the issue of the Daubert motions, but it's not clear to me, because I don't think it's been fully clarified, what the actual standard is. And I'm going to ask for briefing on this as it relates to this type of an expert evidentiary hearing post Comcast. It seems to me that it's this amalgamation of a Daubert standard, but also there are other class-specific issues that would relate to expert testimony.

And so I'm not sure if the role is to essentially, as you say, revive the Daubert motions, but I certainly thing we'd have to -- and I'm going to ask the parties for briefing on exactly what the standard is for this type of a hearing before we have the hearing and alert the parties to what I believe is the appropriate standard before we have the hearing. Because I'm again not sure that any hearing like this has been held, again, as relates to antitrust post Comcast where we're going to have these series of experts on this type of an issue.

But, again, I could be wrong, but I don't know that any Circuit or the Supreme Court has actually laid out what the standard is or burdens or anything like that. And so I think

we're going to have to have a little bit of a discussion about that before the hearing proceeds, but --

MR. ISAACSON: I think that --

THE COURT: -- those are the issues that I anticipate.

MR. ISAACSON: We're happy to do that, Your Honor.

THE COURT: Okay. All right then. Thank you, Mr. Isaacson.

MR. ISAACSON: Thank you, Your Honor.

THE COURT: Mr. -- who is this? Mr. Cramer, are you ...

MR. CRAMER: Your Honor, if you don't mind, we're going to tag-team, Mr. Davis and Mr. Cramer. Mr. Davis will handle, if you don't mind, some of the standard issues that were just addressed. And I'm going to talk more about the hearing itself, if that's okay.

THE COURT: Okay. Well, we're not going to actually argue the standard now. I'm simply going to say that I'm going to receive briefing on the standard and then we'll address it at the time of the hearing.

MR. CRAMER: That's fine. That's fine. I think he just wanted to respond to some of the -- because I think -- I think there have been Supreme Court cases post Comcast that have addressed this issue, and he just wanted -- Mr. Davis wanted to address that issue.

MR. DAVIS: All I wanted to say so the concrete does

not begin to set is that Tyson Foods --

THE COURT: I'm aware of how that --

MR. DAVIS: -- obviously is post Comcast. And I think it's pretty clear relying on Amgen that the only issue is not whether in fact plaintiffs prove common impact, but whether they offer a method that's capable. And if that -- and that that can go to the jury. And if it rises and falls together, as opposing counsel said is true in regard to wage share and foreclosure share, then it's up to the jury. So there's no daylight at least is our position. And I know we're not arguing it now and we don't need to come to resolution, but I just wanted to not have it sort of sit.

In our opinion Tyson Foods is quite clear that in circumstances like those opposing counsel described there is no daylight between the Daubert standard and the Rule 23 standard. If --

THE COURT: Well, here's what I --

MR. DAVIS: I just wanted to make sure that we weren't --

THE COURT: Well, I'm not saying there's daylight.

MR. DAVIS: Yes.

THE COURT: What I'm saying is that the Daubert standard in the context of modeling that has to satisfy a Rule 23 standard is different by nature of what you would have to prove as it relates to the nature of the class that you're

seeking to certify. So it's not to say that Daubert doesn't apply. It's to say that if you're applying Daubert and in the context of expert opinion trying to establish predominance in a case and common impact, that's not simply are you relying upon sort of accepted methodology like regression analysis, right. I certainly read Comcast and Tyson to say that there has to be some further inquiry as it relates to the exact nature of the inquiries that the Court has to go through for class certification.

MR. DAVIS: Right.

THE COURT: And so I'm not saying --

MR. DAVIS: Right.

THE COURT: -- that it's a new standard. What I'm saying is because of the uniqueness of the inquiry --

MR. DAVIS: Sure.

THE COURT: -- regarding sort of predominance, right, in particular that that does I think impact how one applies, in this case myself, the Daubert standard.

MR. DAVIS: Right. And all I wanted to do is just preserve --

THE COURT: Right. So I'm not --

MR. DAVIS: -- and again not have this -- have the cement begin to set on this is because our view is it's simpler than that is for common issues -- if plaintiffs establish common impact, they in antitrust cases virtually always win on

predominance and should. We can explain, you know, at the appropriate time why we think that's true here as well. And that in order to meet that standard, all that actually has to happen is plaintiffs have to say, "Here's our method of proving impact. It is in fact common to the class." And if accepted by the jury that this is -- ultimately, that then it would establish impact in a common way, widespread impact using a common method. And all the Court under Tyson Foods needs to do then at that point is say, "Hey, that's a good enough method that it is appropriate to take to the jury because it will rise and fall together."

THE COURT: Okay. What did you understand me to be saying that's different than that?

MR. DAVIS: I'm not sure. It may be the same to be honest, Your Honor, and so --

THE COURT: I'm trying to understand.

MR. DAVIS: Yeah.

THE COURT: I appreciate you're making your record. I don't know that I said anything --

MR. DAVIS: I don't know about making a record. I was hoping to clarify, but perhaps I didn't.

THE COURT: But to clarify, what did I say that would suggest to you that somehow I thought that it was a higher standard? I'm not saying that. I'm saying the combination of the Daubert standards with a predominance inquiry results in a

unique type of inquiry as it relates to the hearing that I anticipate. I don't think that Daubert answers the types of questions that need to be answered to decide whether or not a particular model establishes common impact or not, but they're related.

MR. DAVIS: Okay.

THE COURT: Okay?

MR. CRAMER: All right. Well ...

THE COURT: All right. I just wanted to make sure I wasn't -- if there was some --

MR. DAVIS: Thank you, Your Honor.

THE COURT: -- confusion about that.

Sure.

MR. CRAMER: Your Honor, I wanted to address the formal issue of the hearing. I think that I will agree with Mr. Isaacson that the Zimbalist/Blair pairing while important for establishing one method of damages -- Zimbalist does use wage share and compares the wage share of the UFC to other sports and Blair -- Blair opposes that method, but I do think that the main action is really between Singer and Topel on the common impact question. And, thus, it might be -- it might be wise to have that as a separate hearing. And then if Your Honor thinks "I didn't hear enough," maybe we need to bring more experts in. It might be wise to have the Singer/Topel pairing at a hearing, maybe also bring in Oyer and Manning who are two

sides of the wage share question.

But I would say that it is -- it would take a long time to have cross-examination and direct examination for six experts and one lay witness. And, perhaps, it would be better to focus the hearing on Singer and Topel, and then if Your Honor finds that you need more information, that this isn't enough for Your Honor to establish common impact, then maybe we bring additional experts in for another hearing.

THE COURT: The problem with that, Mr. Cramer, is that it takes -- it takes more time for me to do that than to just have them all appear.

MR. CRAMER: Okay.

THE COURT: In part because of the scheduling of my cases and the docket particularly in this district, right, than bringing you back, you know, weeks later and me having to go through the testimony, then make preliminary findings about what's been satisfied, but where there are somehow lacunae in the thing -- in the testimony, that to me takes longer.

What I would anticipate is that there are very specific arguments that the defendants make about the inappropriateness of the plaintiffs' modeling that come from the various experts. And that's what I anticipate the testimony to focus on.

I don't anticipate this is going to be a full direct and cross of these experts. That is not the purpose of the hearing. Now, I will give more latitude as relates to

Dr. Singer and -- is it Topel? Am I saying that wrong? "Topal"?

MR. ISAACSON: You were right the first time.

THE COURT: Topel?

MR. ISAACSON: "Topal."

THE COURT: So Professor Topel. I think that obviously I'm going to give the parties latitude as it relates to those experts laying out their views and cross-examining of them, but I have a fairly good idea because the parties have been fairly explicit about ways in which these experts disagree. What's likely to happen is I have a list of questions. I'm going to have even more questions by that time, which I'm just going to ask them a series of questions about the regression models or other models and then bring them up back and forth and have them answer questions.

And so to that extent I think it will not take as much time as you all probably anticipate that it will take. And at that point also I expect there's going to be minimal briefing because it seems to me some of this is just me trying to understand why are there it seems to me very different and almost opposing views on what appear to be similar methods and similar modeling and data and outcomes. And so that's what I anticipate in this case.

MR. CRAMER: Okay. Okay, Your Honor.

THE COURT: But to go back to your initial comment,

certainly we can start with the two main experts. And, perhaps, there can be some lag time between when they would testify and the other experts would testify such that we can all absorb what's been said to focus the remaining experts' testimony. I'm fine with that since this is really about when I schedule it, but I don't know that it makes sense for me to go through a full transcript and make explicit written findings for Dr. Singer and Professor Topel's testimony and then come back and do the hearing again as relates to other experts.

MR. CRAMER: Okay. I understand, Your Honor. Let me suggest for at least the Singer/Topel pairing, I've done two of these hearings recently in an antitrust context with experts. They don't often happen in the Ninth Circuit, but on the East Coast they happen a lot. And I think the best way to do it is to allow the plaintiffs' expert, Dr. Singer, to give a direct exam to explain what he did and how he did it. And then to have cross-examination both by Your Honor, Your Honor can ask questions whenever he would like, and cross-examination from Zuffa. And then to bring Dr. Singer back to allow him to rebut -- I'm sorry.

So we finish with Dr. Singer, direct and cross. And then we bring up Dr. Topel and he gives a direct and there's cross. And then we allow Dr. Singer to come back for a short rebuttal to respond to anything that Dr. Topel has said that may require some response. Your Honor may have further questions

after hearing from Dr. Topel.

So I think with respect to that pairing sort of a full direct, cross, and then redirect -- I'm sorry. Direct of Singer then -- and cross of Singer and redirect of Singer, direct of Topel, cross of Topel, redirect of Topel, and then bring Singer back for a short rebuttal I think would be right.

With respect to the other experts, we may not need to do that full back and forth because I think the real regression modeling here is Dr. Singer's regression modeling and Topel's response to that. Dr. Zimbalist doesn't run a regression.

THE COURT: Right.

MR. CRAMER: Dr. Blair doesn't run a regression. Professor Manning from London really talks about the wage share issue. Dr. Oyer talks about the wage share issue in a ...

THE COURT: Well, here's why I think their information -- maybe their testimony would be helpful. If the question is whether or not -- not just whether or not you properly conducted the regression analysis, but also the viability, right, of the particular variable or factor that you used, those witnesses are directly relevant to that.

MR. CRAMER: Oh, Your Honor, we --

THE COURT: Some of the attack from the defendants on the modeling relates to the appropriateness of particular variables or interactions apart from how the actual regression was done. So, you know, there's some testimony that says,

"Well, okay, we're not saying that there were some errors in the regression analysis itself in terms of statistical errors. We're saying that this variable or factor doesn't capture antitrust injury versus procompetitive" --

MR. CRAMER: You're exactly right.

THE COURT: I don't know how --

MR. CRAMER: You're exactly right.

THE COURT: -- I don't decide those issues in terms of the credibility of the appropriateness of the factor in conjunction with deciding whether or not the model's appropriately applied.

MR. CRAMER: Your Honor is exactly right on the wage share question about whether wage share as a variable to be used in a regression in a case like this is appropriate. Dr. Manning and Dr. Oyer are -- have relevant testimony, right. Dr. Manning both sides believe is authoritative. He says yes. Dr. Oyer said no. Right. So they both have a different opposing view on wage share. So I agree that that pairing I think is more directly relevant to the central issue than the pairing of Blair and Zimbalist. And so maybe --

THE COURT: Well, I think that's true, but I also think that defendants are not going to give up on any -- unless they tell me now, any attacks on any of these variables, and some of them involve some of the things that Dr. Blair said. And so unless -- until I hear from them saying that they're not going

to use any of Dr. Blair's comments or testimony, which I don't -- I haven't heard them say yet, I think they should at least be teed up to potentially testify.

And it may be as you both are saying that they're the last grouping. That's fine. I'm happy to stagger the respective witnesses, but it does seem to me that they need to at least be available for testimony.

MR. CRAMER: All right, Your Honor. And let me just address Mr. Silva. I deposed him for I think it was 10 hours on the record. So we have a long transcript of that. He is a third party who lives in Virginia, I believe.

And there is other evidence that the plaintiffs have of internal equity, this concept of internal equity. Joe Silva is an important witness and his documents are important to the internal equity question.

THE COURT: You think there's a more important witness on internal equity than Mr. Silva? In terms of you -- the plaintiffs make reference to documentary and testimonial evidence to establish internal equity. It seems to me Mr. Silva's name just keeps coming up in that section.

MR. CRAMER: You're right.

THE COURT: Right? So --

MR. CRAMER: You're right that Mr. Silva is an important witness, but my -- if Your Honor wants Mr. Silva, Mr. Silva will come here. But if the third -- if Zuffa can

encourage him or Your Honor can encourage him to come here, he will be here and we will talk to him.

THE COURT: Right.

MR. CRAMER: My point is simply that his testimony on this subject is locked in. And we'd be happy to redo it here, but it may be one way to cut a corner. If Your Honor is not interested in cutting that particular corner, then we'll bring and talk to Mr. Silva.

THE COURT: I am not. And again part of this, Mr. Cramer, has to deal with again reading the combination of these cases. Again, as I look at Comcast and Tyson, they seem to set a slightly different bar as it relates to how extensively involved they want District Courts to be at the motion to certify stage. And what I wouldn't want to have happen is to have a decision that I rendered either denying or granting the motion somehow be reversed because there was just an area of the testimony that we did not include in the hearing. That's my concern is this is a slightly moving target as it relates to the evolving standard here because I do think it's evolving. And I certainly wouldn't want there to be aspects to any decision that I rendered that were not explored adequately in the context of providing the basis for my decision.

MR. CRAMER: We understand, Your Honor.

I guess the only -- the last thing I would say about the -- the hearing is with respect to the standard I guess what

I would say is that I think it's pretty clear and I think Your Honor said this, but I just want to make sure that we're all on the same page, plaintiffs do not have to win, right. We don't have to show we're right.

THE COURT: Well, I --

MR. CRAMER: We just have to show that our method is reliable. So the question isn't whether Dr. Singer is right; it's whether his method is reliable enough under Daubert to go to the jury.

THE COURT: No, I understand that, but what I'm saying is I do think in the proceeding that I'm envisioning there would be certain arguments that would be foreclosed by the defendants if I were to find that the plaintiffs prevailed at this stage of the hearing.

MR. CRAMER: I think you're right. I think you're right.

THE COURT: And the question is what are those, right. What is -- because there is a mix here of methodological, right, and what I like to call sort of substantive sort of relevant modeling. In other words, there is a question about whether you are accurately interpreting the results versus whether or not the variables that you've selected are appropriate to capture what you say they're supposed to capture.

And I think the implications of my ruling on those different types of factors carry over to the case if it proceeds

in a class. If it doesn't, obviously it doesn't matter. What I didn't want to have happen is for the parties not to consider that in the context of the proceeding and if we're -- all of us to be thinking about what those implications are.

It doesn't mean, Mr. Cramer, that I find that you have to prove your case at this point in time, that you have to prove, because I don't think that's the standard, that this is the best model for doing this. I don't think that that's required.

I do think you have to demonstrate that it's an adequate and reliable model, right, to argue to the jury that it -- that it's not so flawed that in fact it cannot reasonably argue that it purports to capture what it captures. I think that's what you would have to be able to demonstrate.

MR. CRAMER: We agree with that. We agree with that.

THE COURT: Right. But I don't think you have to prove it, but I do think, though, ironically that some of the nature of the determinations I make are dichotomous, right, in terms of this particular variable percentage of event revenue is appropriate or not. That's not a -- I can't I think when I have -- when hearing the testimony, I can't say, "Well, maybe." You know, partly this variable I think that there are some decisions that are dichotomous, and that may as a result of them being dichotomous regarding variables that are acceptable or not or whether or not a variable captures antitrust injury or not

that will have impact.

MR. CRAMER: Fair enough, Your Honor. Let me just address one other thing. A hearing with seven witnesses takes a lot of time to prepare for. It's also a logistical issue with getting everybody on the same page, including Dr. Manning from London. And so January may be at least for the plaintiffs --

THE COURT: Okay.

MR. CRAMER: -- too soon for us. Perhaps, what should happen is the parties can meet and confer and --

THE COURT: Well, if you want to meet and confer, that's fine. I wanted -- because, you know, the case is moving. It's moving -- it's a big case. So it's not going to move as quick as other cases, but I wanted to give you the option of trying to move this as expeditiously as possible. At the same point if you think logistically it's more efficient for all of you to be able to coordinate your schedules along with these witnesses, that's fine. I'm not going to simply order a time and require everyone to be there for that particular week. And so if you want to coordinate, try first to come up with a schedule, that's fine. I'm happy to do that.

What I would suggest is you come up with a schedule that has pairings of the experts that's staggered, okay, that starts with Dr. Singer and Dr. Topel and then it moves on from there, right. So that's what I would suggest that you would have it set, I mean, for a particular week and then maybe we'd

have the next week -- because I don't want to set them too far apart. So I think, you know, one week and then one other pairing the next week and then a third pairing the following week would make the most sense. That's easier for me to fit into my schedule to find a day in a particular month, and it may be easier for you all to do it that way as well.

I don't think it's going to take a day. I think Dr. Singer and Dr. Topel are going to take two, three days, but just so we're clear.

MR. CRAMER: Okay.

THE COURT: I think they're going to take -- I think I would expect that they will take a day and a half each. So you should allow for three days for that pairing, and then we'll deal with the others. I think the others would probably take a day and a half combined at most, and we should allow for that. And I think the last pairing, Dr. Zimbalist and ...

MR. CRAMER: And Blair.

THE COURT: And Blair is maybe a half day, I mean. Well, we'll say a day because you all are traveling from all of these different locations, a day anyway, but a half day to a day.

MR. CRAMER: Fair enough, Your Honor.

THE COURT: Here's what I will tell you, though, Mr. Cramer. I have real questions about the identity class and its viability in this case. I would strongly encourage you to

the extent that you can highlight issues with that class you do so at the hearing because at this point I'm not sure that I think that that class is going to make it. And I just wanted to be honest with you because it seems to me that the focus of Dr. Singer's results, and maybe I've missed something, has been primarily on the bout class and many of the variables relate to the bout class and sort of the event revenue.

So I think in relation to what -- to prepare for the hearing I would certainly have Dr. Singer be prepared for that, be prepared to talk about the issue of the interaction of monopolization and sort of the monopsonistic conduct here and whether or not there's any relation there and whether or not any of his conduct is related to that. Those are all fair questions, but I wanted to really stress to you that I'm not sure that I find that there's going to be enough at least from what I've seen for the identity class to be certified.

And if you think there's somehow parts of Dr. Singer's report that have not been sufficiently highlighted in your briefs, I'm not saying you get to redo the report, but certainly you can use the hearing to distinguish between evidence related to the bout class and the identity class because I'm not sure you can simply say, "Well, this evidence for the bout class applies equally to the identity class," because I have to tell you I'm not persuaded by that. So I will allow you an opportunity to be able to explore that a little bit more with

Dr. Singer.

And, Mr. Isaacson, I'm not sure if you're going to be doing the cross, but I will allow the defendants some latitude on that; because as it relates to the identity class, I have some real concerns about whether or not the modeling captures the alleged antitrust injury or whether or not there's appropriate markets that are defined in that context. You don't have to respond to that, but --

MR. CRAMER: We hope to address your questions at the hearing, Your Honor.

THE COURT: Okay. But I wanted to highlight -- to highlight that for you because I think that's something that you're going to need to --

MR. CRAMER: Let me ask right now while we're talking about issues, are there other issues that Your Honor wants us to -- other than obviously the ones you've pointed out, the wage share and internal equity, are there other issues that Your Honor would like us to focus on at this hearing in particular?

MR. CRAMER: No, I think that the parties have adequately identified through the back and forth the issues that need to be identified in the context, particularly of Dr. Singer and Professor Topel's expert testimony. That there's obviously questions about modeling for common impact and the impact across the class as well as impact for each of the members of the class.

I don't know and I will give some more thought to how much guidance I want to provide as relates to that. What I do think we should do is set a hearing prior to the set of hearings so that we can identify what -- clearly what the standards are, what the parameters of the hearing or hearings are going to be. And so you all, as you meet and confer, should come up with a schedule for that hearing and included in that should be a schedule for briefing.

And the issues that I do want to have briefed are the appropriate standard for the Court to decide whether or not in the context of a motion to certify the model can serve as a sufficient basis for this Court to certify the class and what specific findings the Court would have to make for the class to be certified based upon this modeling.

And I say that for both sides, but I want to emphasize this for you, Mr. Isaacson, which is what I don't want to have happen is if there's an argument you're going to raise on a particular issue of certification because then we're going to argue certification after that that you -- that you then say, "Well, they didn't present evidence on this particular factor, but we didn't really ask about it at the hearing either." You'll be foreclosed from presenting that type of an argument. I'm not saying you would do that, but I have sometimes counsel can get caught up in the hearing and not recognize that they haven't asked certain types of questions.

Now, it's not to say that you are waiving arguments that you've raised in your submissions and that if you don't ask them again at the hearing you have to ask them. But if there's a particular argument that you feel is appropriate to raise and I say this particularly in the context of there is this procompetitive portion of this model that they simply did not account for, right, and you've raised that. I think that's important for you to explore that with the witness and not simply not question Dr. Singer about that and then say, "Well, he didn't establish that."

That's the sort of thing that I think wouldn't be helpful and I wouldn't look favorably upon. I'm not saying you would do that. Because I do think one of the issues that, again, if you look at the Supreme Court case in this case there's a real issue about the modeling capturing in a reliable way and adequate way antitrust injury.

That does remind me of one other point, though, Mr. Cramer, which I did want to bring up with you which is I'm not sure why the bout class wouldn't start over with the takeover of Strikeforce. I'm not sure why you picked 2010 versus I think the Strikeforce acquisition is 2011.

MR. CRAMER: March 2011, I believe.

THE COURT: Right, that -- Strikeforce is a fighter's all-time exclusive contract. It would seem to bolster your argument. I don't know why you wouldn't start the class --

MR. CRAMER: We could have started there, Your Honor. I believe that Strikeforce -- the takeover of Strikeforce is part of the challenged conduct. It's a significant part of the challenged conduct, but it's only part of it and we believe that conduct has been continuing. And so the start date of the class is four years prior to the day we filed, which was December 14th, I believe, to the day four years ago.

THE COURT: December 14th.

MR. CRAMER: December 14th, 2014, I believe is the day that we filed.

THE COURT: Right. So the class is December 2010?

MR. CRAMER: Right, it's four years.

THE COURT: I was just trying to figure out that -- okay. That helps me understand.

MR. CRAMER: That's why. It's the statute. The antitrust statute of limitations is four years, and so that's the date we picked. Obviously the takeover of Strikeforce changed the industry in our view in a substantial way, and it is very close to the beginning of the class period.

THE COURT: Because one of the other things I also would anticipate that would come out of this hearing is that I would decide if I thought class were to be certified would have to decide what the contours of what that class are or could be. And for me one of the issues is the date and the other issue, as I said, is the identity class which, again, I would encourage

plaintiffs to make their best arguments for. But I do think that that's something that's an issue that came up in the context of my review of the case.

MR. CRAMER: I had one issue. Your Honor, the parties submitted a stipulation regarding some supplemental expert reports that were served upon each other, and that is before Your Honor. And I think one question I think the parties would have before we begin the hearing is are those additional expert reports going to be part of the record.

THE COURT: Yes.

MR. CRAMER: Okay.

THE COURT: Just can you just identify for me -- again, I want to make sure I'm having -- I'm considering the right documents. Because, again, what I don't want to have there -- there to occur is for there to be arguments about the parties not having certain information available to them. It's not to say that whatever arguments that the parties have raised as to the viability of the reports can't be raised for me at the hearing, but I don't want to be getting into back and forth about this supplemental report is a part of this process or not.

So I'll go back and look at them, but my recollection of the submissions that I believe that you're talking about would be that those reports would be reports and information that could be included in the -- in the hearing.

MR. CRAMER: Your Honor, on May 7th, 2018, Document

545.

THE COURT: Is that the only document you're talking about?

MR. CRAMER: Yeah, the parties submitted a document called Joint Motion to Supplement Expert Reports. That's the document I'm talking about.

THE COURT: All right. So, Mr. Isaacson, any objection to me granting that?

MR. ISAACSON: It's a joint motion.

THE COURT: Well, you know, you'd be surprised how many times lawyers actually change that their minds about joint motions that they have filed. So nothing surprises me.

MR. ISAACSON: I haven't done that yet, but maybe that -- I will not get my shot in the future.

THE COURT: Okay. So that joint motion will be granted.

MR. CRAMER: Thank you, Your Honor.

MR. DAVIS: One logistical issue. I do wonder if we -- just to make sure I understand, we have a hearing with witnesses and then a prehearing date to sort of organize that. And I wonder if it wouldn't make sense to set that prehearing date today, if that's at least possible, so that we can -- because once everyone's disperses, you know, there will be a lot of meeting and conferring.

THE COURT: I'm happy to do that, I mean.

MR. CRAMER: Let me just say that maybe it would be a good idea if we met and conferred about that, to contradict my colleague.

THE COURT: Well, here's what I'll tell you. I have another -- I would like to get that done today. I have another hearing at 3:30. I don't think it would be too much to ask for you all after I finish that to come back if you need to or simply to say, "We've agreed." Because if you can't agree, then I will set it and then sort of --

MR. CRAMER: I'm sure we can come to an agreement on a date. We're not that obstructive.

THE COURT: But here's what you also have to agree to which I would want you to agree to also the briefing schedule as it relates to briefing. In my view this is simultaneous briefing and simultaneous responses. I don't want back -- so you both would submit your version of the standard, then you both would get one opportunity to respond to the other's briefing regarding the standard, and then that's it.

MR. CRAMER: Fair enough.

THE COURT: And I don't think there's anything else that we would need to address, but it seems to me the standard would be the issue. And in the course of the preparation for that, I'll go through and see if there are other issues -- particular issues that I have regarding things that need to be emphasized, like I had said to you, Mr. Cramer. And there may

be other issues, Mr. Isaacson, that I would want the defendants to focus on.

MR. CRAMER: One other question about the contours of the hearing. The way I understood Your Honor to suggest we'd have this prehearing conference, we'd have the hearing with the experts and then a class certification argument at another time after that.

THE COURT: Yes.

MR. CRAMER: So Your Honor does not expect argument during the hearing. Is that correct?

THE COURT: No.

MR. CRAMER: That's correct. Okay.

THE COURT: No, I don't expect argument during the hearing. And I know that I'm saying that and that may not be followed, but I would expect that you would point out after the first day, our first event, that we might have a discussion about what would be the contours of the remaining experts' testimony so -- but what I would likely do is give you my impressions of what I think is left to be done for those experts so that you don't have to spend unnecessary time on those sorts of issues.

MR. ISAACSON: That makes sense. If there's someone we can confer with about if we're going to talk about a hearing date when the Court's available.

THE COURT: Well, sure. I can give you some possible

dates. If you give me a few minutes here, I can give you some possible dates.

MR. ISAACSON: And I apologize, Your Honor. I turned on my phone so that I can look at a calendar.

THE COURT: Oh, that's all right.

So I'm thinking that it would be, just see if this is generally fine, some time in February we would have the prehearing conference or hearing, I should say, to the middle to the latter part of February. That would allow for the parties to reasonably enjoy their holiday and then get back to work and begin the new year regarding the standard. So -- and, again, I don't anticipate that the briefing regarding the standard would actually take that long. I think part of it is your best impressions of what the four, five decisions that exist say and, perhaps, you can suggest to me what other District Courts have done. Although, as you all know, that may be persuasive, but certainly not binding.

What I will say is as it relates to the briefing, and I'm saying this more to you, Mr. Cramer and Mr. Davis, is that if I have some concern about sort of what the standard is, I'm likely to apply what I think is the most strict standard. So you should give me the range. And, you know, depending upon how you view that, that may or may not benefit you depending upon --

MR. CRAMER: If you grant the class.

THE COURT: Exactly. I knew that was coming, right.

Yes. "If you grant the class and we don't pay, that helps us," right?

MR. DAVIS: You can just tell us how you would rule under each standard in advance.

THE COURT: If only, right.

MR. ISAACSON: Yeah, and we --

THE COURT: But I do think that with the understanding that it may not come down to a specific sentence, but this could be the range of what the standards would apply in this case. But I don't expect it to be more than 10 pages.

MR. CRAMER: And does Your Honor expect those briefs to be in before the mid-February conference?

THE COURT: Yes.

MR. CRAMER: Because at the mid-February conference we're going to decide what the standard is, what the contours of the testimony are. If you all can also come to that conference prepared to agree to certain stipulations, because the experts actually do agree about certain things, not many, but there are certain things that there's agreement about. And so it does seem to me that, for example, there should be an agreement about what the nature of the alleged errors are that have been identified.

So that you don't necessarily have to agree with it, Mr. Cramer, but I would expect that the parties would be able to say, "We agree that" --

MR. CRAMER: What are the bones of contention.

THE COURT: -- "these are the key tenets of the opinion. Here's the models that were used. Here are the issues that we have with the models." And that focuses more on defendant's arguments, but so that there's a clear list of what you all agree to, what you don't agree to. Obviously I know your positions on that. But in the briefing you all do, and I think part of this is the nature of how the standard has applied, skip around a little bit about what evidence relates to common impact and the two-step process for the bout class versus the identity class. And some of that did overlap, but some of it doesn't.

So it would be helpful for me for you all to come up with at that hearing an agreed-upon sort of stipulated set of facts as relates to the experts' opinion if you can, but also an agreed-upon set of disputed issues. So not quite a joint pretrial order, but again I find in this circumstance it's more helpful for us all to understand what it is that's disputed specifically so that we don't have any concerns or issues about people having been misled about what the other side was going to be asking about.

MR. ISAACSON: We appreciate that, Your Honor. And the briefing's going to be important to us because it's quite clear there's going to be some disagreements because you're being told that all you need to decide is whether or not the issue of

common impact can go to the jury. And since the issue of common impact doesn't go to the jury, we're going to have a different view on that.

THE COURT: You are. Is 10 pages going to be enough for you?

MR. ISAACSON: Yes.

THE COURT: Okay. Good. I like to hear that. And so, yes, again 10 pages for each brief. So -- and I meant for both the initial briefs and the responses.

MR. ISAACSON: Thank you.

THE COURT: Okay. So why don't we then give you some possibles for the hearing dates in this case. Give me a second and we'll -- or a few seconds and we'll work that out. Anything else while you all are up there together?

MR. ISAACSON: I don't think so.

MR. CRAMER: No, Your Honor. Thank you.

THE COURT: Wow. Okay. Thank you. Give me a second here.

(Court conferring with courtroom administrator.)

THE COURT: So while I said I'd have a few dates, of course I don't really have a few dates. I think I have one. February 1st to have the hearing or I would have to go to March if you all -- because I have time in March I could do it because February 1st is tight and I recognize that. And it may be -- you may need to have more time to talk with your experts, but I

at least like to give the parties the option. Again, we're not doing the hearing on the 1st, but sometimes -- you may want to confer with them. But is that too tight a time frame? Because, otherwise, we do have to move it to March. I don't know that I have anything in February.

MR. CRAMER: Your Honor, I left my calendar back in my hotel room. I am a dinosaur and use a paper calendar. So if I could confer with Mr. Isaacson later tonight, we can --

THE COURT: Well, let's give you a March date, too, then so that you have both and you don't have to come back.

MR. CRAMER: Okay.

(Court conferring with courtroom administrator.)

THE COURT: So March 8th is the other date.

MR. CRAMER: Okay. Your Honor, we will confer and get back to your chambers.

MR. ISAACSON: So in terms of meeting and conferring about the actual dates when evidence is going to be take -- taken, does that mean we should be looking at -- based on what you just said about February, does that mean we should be looking at March or ...

THE COURT: Well, if you do February 1st, then we can look potentially at March dates, but what I would encourage you to do is look at March, April, and May dates.

MR. ISAACSON: I will say I have a five- to six-week trial starting April 15th. So this is it -- for me this is

going to have to be a before or after event, so ...

THE COURT: Well, I'll leave that to the parties to work out.

MR. CRAMER: Okay.

THE COURT: And we may be able to do, again, sort of the main event, you know, Dr. Singer and Dr. Topel, first. And then if the parties are amenable to coming back after that, and it may be that that works out the way that you had suggested, Mr. Cramer, with respect to the way the case should proceed regarding looking at those witnesses' testimony first.

MR. CRAMER: Okay.

THE COURT: So, the other thing that I intend to do is deny the motions for summary judgment without prejudice so that if you wanted to supplement them you can. If you simply want to, Mr. Isaacson, reinstate them, right, you can do that. But it may be that as a result of what happens at the hearing, for each of you, you may want to supplement those. And I don't want to have a whole new set of motions. Well, I wouldn't want -- I'm sorry.

I don't want to have supplements. What I would rather -- it's easier for me to do is not to piece together supplements, but to actually have you -- even though it may be a little more work for you, if you want to reconfigure your argument, that you do that rather than send me a supplement that sort of is referencing different pieces than what you've

previously submitted.

If you want to simply just reference what you have previously filed, you can simply do that, but I would anticipate that there might be some supplementing given what's happened in this case overall. It's hard for me to imagine that the parties might not take an opportunity to be able to add to the record from the hearing.

So I'm going to deny the motion for summary judgment without prejudice to allow for a supplementing of the record as it relates to that particular motion. So you'll be able to file the motion. We can talk about and you all can talk about when and how you'd set up a schedule for that, but I do think that given what may or may not come in in this testimony that may -- and what potentially I decide about certain aspects, that may change what you argue or don't argue in the motion for summary judgment. I don't want to have to piece together different parts of supplements for that motion.

MR. ISAACSON: Understood, Your Honor.

THE COURT: Okay.

MR. CRAMER: Thank you.

THE COURT: All right.

Okay. Have we resolved everything?

MR. CRAMER: I think so, Your Honor.

THE COURT: I mean for today. I know we haven't resolved everything.

MR. CRAMER: Yes.

THE COURT: So we don't then need for you all to meet and confer about or stay in the courtroom or out in the court about those dates. What I will expect is you'll pick one of the two of those dates because really those are the only dates that I have. And then what I would expect you to meet and confer about as quickly as possible is the dates you think that Dr. Singer and Dr. Topel can be available, right. And given the nature -- I mean, but they have to be together. So their testimony has to be joint. They both have to be here --

MR. ISAACSON: For all three days, yes.

THE COURT: -- for all three days.

MR. CRAMER: Yes.

THE COURT: And prepared to go back and forth on the witness stand, right, hot tubbing as you described. So it's up to you when those dates are, but let me know when they'll be.

MR. CRAMER: Thank you, Your Honor.

THE COURT: Okay?

MR. ISAACSON: Thank you.

THE COURT: All right. Let me just check and see if I'm missing anything. Hold on.

(Court conferring with law clerk.)

THE COURT: What I would like for you all to do, if you wouldn't mind before you actually leave, is check to see if there are any other stipulations or joint motions that I should

resolve now that you may think need to be resolved at this point in time.

There is something we have to resolve which is what are the defendants going to want to do about sealing of testimony and records. And, Ms. Grigsby, you started us off, but I think there's going to need to be some proposed procedure as it relates to what should or shouldn't be protected and how. And that can be as part of the same joint filing in terms of what you all propose for a schedule. But I do think what you should do, the defendants should do, is propose a procedure and propose areas of testimony that should be you think protected. As I've indicated to you, I don't think it would be appropriate to protect all areas of this record, but it doesn't mean I intend to unseal information.

So I would encourage you to propose some sort of either staggered or other prioritized approach to what you think should happen. But what we'll do is that will be set on the same schedule as the briefing schedule. So I'll let you all come up with that because what I would anticipate is that you all will propose -- after you decide on the date propose a schedule for me as it relates to the briefing. Okay?

Any questions about that?

MR. CRAMER: No, Your Honor.

THE COURT: All right.

All right. I'm just reluctant to release you without

getting more work done, but I think that we've done all that we can do for today. I appreciate you all coming and being prepared. I don't know if there's anything else that we need to do in terms of the joint motions or preparation for the hearing. I'm looking over my notes.

So we're adjourned in this case. Thank you very much.

MR. CRAMER: Thank you.

MR. DAVIS: Thank you, Your Honor.

THE COURT: I'm going to stay here for a few minutes. Go ahead.

(Whereupon the proceedings concluded at 3:33 p.m.)

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COURT REPORTER'S CERTIFICATE

I, PATRICIA L. GANCI, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: December 18, 2018.

/s/ **Patricia L. Ganci**

Patricia L. Ganci, RMR, CRR

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